(1)

90-1139

Supreme Court, U.S.
FILED
JAN 14 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. _____

STEVEN BENNETT,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TENNESSEE

CHARLES W. B. FELS
Counsel of Record
RITCHIE, FELS & DILLARD, P.C.
606 W. Main Avenue
Post Office Box 1126
Knoxville, TN 37901-1126
(615) 637-0661
Attorney for Petitioner

QUESTION PRESENTED:

Whether the Tennessee "Hired Gun" Statute, Tenn. Code Ann. § 8-7-401, which permits private attorneys to participate in public prosecutions violates both the Due Process and Equal Protection Provisions of the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	I
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED ...	2
STATEMENT OF THE CASE	3
REASON FOR GRANTING THE WRIT	12
The Tennessee "Hired Gun" Statute, Tenn.Code Ann. § 8-7-401, which permits private attorneys to participate in public prosecutions violates both the due process and equal protection provisions of the United States Constitution	12
I. Introduction -- The Origins of the Antiquated and Outdated Practice of Private Prosecution ..	12
II. Tenn. Code Ann. § 8-7-401 violates fundamental notions of due process of law as afforded by the 14th Amendments to the United States Constitution	26

III. Tenn. Code Ann. § 8-7-401 as applied to the instant case violated fundamental notions of equal protection as afforded by the 14th Amendments to the United States Constitution 43

IV. Conclusion 50

APPENDIX

Motion to Challenge the Constitutionality and Lawfulness of Permitting Private Parties to Retain Well-Known Private Counsel to Prosecute Public Offenses in a Highly Publicized Case in Which Duly Elected Public Officials are Fully Competent to Discharge the Duties of Their Office 1a

Transcript of Motion Hearing before the Circuit Court for Blount County, Tennessee on April 29, 1988 ... 14a

Order of Circuit Court of Blount County, Tennessee, Judge Crawford, Entered May 18, 1988, Denying Permission to Raise an Interlocutory Appeal Pursuant to Rule 9, Tenn.R.App.P. 30a

Judgment and Opinion of the Tennessee Court of Criminal Appeals, Entered June 7, 1990 ..... 32a

Order of Tennessee Supreme Court Entered October 15, 1990, denying Steven Bennett's Application for Permission to Appeal 40a

Tenn. Code Ann. § 8-7-401 ... 41a

U.S. Constitution,
Amendment 14 ..... 42a

TABLE OF CASES AND OTHER AUTHORITIES

Page

I. CASES

Berger v. United States,
295 U.S. 78, 55 S. Ct. 629,
79 L.Ed. 1314 (1935) 19

Biemel v. State,
37 N.W. 2d 244-248
(Wis. 1888) 15,23

Booth v. Maryland,
482 U.S. 496 (1987) 15,43

Born v. State,
397 P.2d 924
(Okla-Crim.App. 1964) 15

Cantrell v. Commonwealth,
229 Va. 387, 329 S.E.2d
22 (1985) 16

Commonwealth v. Williams,
56 Mass. (2 Cush.)
582 (1849) 15

Cozzolini v. State,
584 S.W.2d 765
(Tenn. 1979) 34

Fledge v. State,
93 Neb. 610,
142 N.W. 276 (1913) 39

Ganger v. Peyton,
379 F.2d 709, 714
(4th Cir. 1967) 32,33,41

Gregg v. Georgia,
428 U.S. 153, 187 (1976) 38

Griffin v. Illinois,
351 U.S. 12 (1956) 45,46,47

Groppi v. Wisconsin,
400 U.S. 505, 509
(1971) 26

Hughes v. Bowers,
711 F.Supp. 1574
(N.D. Ga. 1989) 33

In re Murchison,
349 U.S. 133, 136 (1955) 26,27,32,38

Irvin v. Dowd,
366 U.S. 717, 722 (1961) 26

Jones v. Richards,
776 F.2d 1244
(4th Cir. 1985) 33

McKay v. State,
90 Neb. 63, 132 N.W. 741
(1911) 15

Meister v. People,
31 Mich. 99, 105-06
(1875) 15,22,31

Offut v. United States,
348 U.S. 11, 14 (1954) 27

Reid v. Convert,
354 U.S. 1, 45 (1957) 38

South Carolina v. Gathers,
___ U.S. ____, 109 S.Ct.
2207 (1989) 43

State v. Bennett,
C.C.A. Number 230
Blount County)
(June 7, 1990) 11

State v. Cone,
665 S.W.2d 87, 95
(Tenn. 1984) 5,34

State Ex. Rel O'brien v. Moreland,
778 S.W.2d 400, 406
(Mo. App. 1989) 39

State v. Harrington,
532 S.W.2d 44 (Mo. 1976) 15,24,39

State v. Jensen,
178 Iowa 1098, 160 N.W.
832 (1917) 15

State v. Johnson,
632 S.W.2d 542
(Tenn. 1982) 34

State of N.J. v. Kinder,
701 F.Supp. 486
(D.N.J. 1988) 33

State v. Peterson,
218 N.W. 367, 369
(Wis. 1928) 17

State v. Ray,
143 N.E.2d 484, 485
(Ohio App. 1956) 14

State v. Scherr,
9 Wis.2d 418, 426,
101 N.W.2d 77 (1960) 23

State v. Scott,
72 Idaho 202, 239 P.2d
258 (1951) 16

State v. Voltz,
626 S.W.2d 291 (Tenn.Crim.
App. 1981) 15

State v. Workman,
632 S.W.2d 542
(Tenn. 1982) 34

Young v. United States Ex Re. Vuitton Fils S.A.,
481 U.S. 787, 107 S.Ct. 2124,
2135, 95 L.Ed.2d 740, 756
(1987) 20,40,41

OTHER AUTHORITIES

Page

4 *National Commission on Law Observation and Enforcement on Prosecution* 7 (Wickersham) Comm'n 1931) 16

A.B.A. Code of Professional Responsibility EC 5-14 24

A History of the Criminal Law of England,
J. Stephen, 245 (1883) 13

Criminal Procedure: France, England, and the United States,
8 DePaul L.Rev. 256, 257
(1959) 13

Sidman, *The Outmoded Concept of Private Prosecution*, 25 Am.U.L. Rev. 754 (1976) 13,14,15

Sup.Ct.R. 14.1(h) 6

T.C.A. Section 8-7-102 48

T.C.A. Section 8-7-103 48

T.C.A. Section 8-7-105 48

T.C.A. Section 8-7-106 49

T.C.A. Section 8-7-107 49

T.C.A. Section 8-7-401 ..... passim

T.C.A. Section 39-2-203(i)(3) . 5

Tennessee Code of Professional Responsibility, Canon 7, EC 7-1 20

Tennessee Code of Professional Responsibility, Canon 7, EC 7-13 19

T.R.App.Proc. Rule 9 6

28 U.S.C. § 1257(a) 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. _____

STEVEN BENNETT,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TENNESSEE

Petitioner Steven Bennett respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Tennessee Court of Criminal Appeals entered on June 7, 1990, and the denial of permission to appeal by the

Tennessee Supreme Court entered on October 15, 1990.

OPINION BELOW

The opinion of the Tennessee Court of Criminal Appeals is reprinted in the appendix. See App. at 32a. The order of the Tennessee Supreme Court denying permission to appeal is likewise reprinted in the appendix. App. at 40a.

JURISDICTION

The judgment of the Tennessee Court of Criminal Appeals was entered on June 7, 1990. Petitioner's application for permission to appeal was denied by the Tennessee Supreme Court on October 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment 14

This provision is set forth at App. 42a.

STATEMENT OF THE CASE

On June 22, 1988, the petitioner, Steven Bennett, was placed on trial for capital murder in Blount County, Tennessee, a small rural county near the mountains of East Tennessee.

He was prosecuted by a team of three lawyers. Two of the three lawyers were private practitioners who represented the family of the deceased; the third prosecutor was an Assistant District Attorney.

The two private practitioners were law partners who had been asked by the family of the deceased to help the State seek the death penalty.

One private lawyer was the long-time chairman of the Republican party in what was a predominantly Republican county. His law partner was a member of the Executive Committee of the Democratic party

for the State of Tennessee. Both men were popular and well-regarded in the community.

Acting pursuant to the Tennessee "Hired Gun" statute which permitted privately retained lawyers to help prosecute criminal cases, both men entered appearances as co-counsel with the District Attorney in the prosecution of the Bennett case.

At the request of the deceased's family, the two "private" prosecutors met with the District Attorney and requested that the State seek the death penalty.

They were successful.

Just three weeks before the trial was to begin, the State filed a notice seeking the death penalty. The State cited a single aggravating circumstance in support of the death penalty, alleging that the single shot which was fired "knowingly created a great risk of death to two or

more persons, other than the victim . . .". Tenn. Code Ann. § 39-2-203(i)(3).[1]

Thereafter, the two private attorneys took an active and vigorous role in the prosecution of the case at trial. Both participated in voir dire and both pointed out to the prospective jury members the fact that they represented the family of the deceased. Both men introduced the mother of the deceased to the venire.

---

[1] Neither the testimony of the State's own expert witness nor the testimony of three bystanders, all called by the prosecution, ever supported such a condition. The State's expert forensic pathologist testified that the single shot was discharged fully into the body of the deceased and therefore could pose no risk of death to anyone else. The bystanders testified they were unharmed in any fashion. The Tennessee case of *State v. Cone*, 665 S.W.2d 87 (Tenn. 1989) appeared to make clear that such an aggravating circumstance did not apply in cases such as this. Despite a timely objection however, the trial court permitted the case to go to the jury as a capital murder case.

Each private practitioner called witnesses on behalf of the prosecution and each participated in cross-examination of the defense witnesses.

One private attorney made the state's opening statement while the second participated in the final argument.

Ultimately one private attorney appeared at the sentencing hearing.[2]

The case which they helped prosecute was tragically simple. On Halloween night, October 31, 1987, two

---

[2] The participation of these two private attorneys was vigorously but unsuccessfully challenged by the petitioner prior to trial. (App. at 1a, 14a). The trial court denied an order for an interlocutory appeal pursuant to Rule 9 of the Tenn.R.App.Proc. (App. at 30a). Petitioner then sought an extraordinary appeal to the Supreme Court of Tennessee pursuant to Rule 10 which was also denied as moot after the trial had been concluded. Hence, the constitutional issue which is now brought before this Court was in fact raised and preserved in a timely fashion. (*See*, Sup.Ct.R. 14.1(h)).

married women and their four children went trick-or-treating by car in an affluent neighborhood in Blount County. To their terror, as they were leaving the neighborhood, they were pursued by the driver of a vehicle with a dark tinted windshield. Unable to see the driver or any other occupants of the pursuing car, one of the women, Mrs. Steve Bennett, sought to flee the subdivision. The driver of the other car immediately gave chase, speeding up behind the women and children and flashing his high beam lights in an effort to blind them. When Mrs. Bennett sought to pull into a convenience store to seek help, the pursuing car pulled in front of her, blocking her path. Terrified, Mrs. Bennett told the four children to cling to the floorboard of the car as she raced for home with the children crying in hysteria.

Unable to get away, Mrs. Bennett fled down the curving country road which led to the trailer she shared with her husband Steve Bennett, the petitioner. Terrified, she drove through their front yard blowing the horn.

Steve Bennett and his brother-in-law raced to the front door, saw the darkened car and gave chase. They were unsuccessful.

Returning to the trailer, the petitioner and his brother-in-law decided to return to the suburb where the original difficulty had arisen. As they were about to leave, Mrs. Bennett handed her husband a loaded shotgun and warned him to be careful because she was not sure if the people behind the tinted windows were armed and dangerous.

The petitioner located the house where the chase had begun and found the

darkened car parked in the driveway. Angry that his wife and children had been placed in peril, Steve Bennett accosted the driver, demanding to know why he had tried to kill Bennett's family. A heated and emotional exchange ensued. Ultimately the petitioner attempted to scare the driver by firing a shot between his legs.

As the State's evidence showed, the single shot was fired downward at a 45 degree angle. It caught the driver in a crouched position in the left hip. Tragically, the shot at that close range would prove to be fatal. The wounded man died in the hospital three days later.

The three bystanders who witnessed the encounter were unharmed.

Badly shaken, Bennett returned to the family trailer where his wife had already called the Sheriff's Department. Later in the evening, a Sheriff's deputy

questioned Bennett who admitted in a videotaped voluntary statement that he had fired the single shot out of anger and a desire to warn the other man away from his family.

Sadly, it transpired that Lance Russell, despite his unprovoked and threatening behavior earlier in the evening, was a 17-year old high school student from a well-to-do family. Russell apparently had mistaken Cindy Bennett and her car full of children for friends who had just played a Halloween prank on the Russell residence. He had embarked in a high speed game of chicken in an effort to retaliate for the prank.

Steve Bennett, on the other hand, was fully employed as a truck driver. His father was the pastor of a local rural church. Highly protective of his wife and two children, until this tragedy he had

lived a productive and blemish free adult life.

Faced with three prosecutors who insisted that the case was a death penalty case and confronted with a defense of involuntary manslaughter, the jury ultimately returned a compromise verdict of second-degree murder. Steve Bennett was then sentenced to 17 years in prison.

The Court of Criminal Appeals affirmed the judgment of conviction on June 7, 1990, and upheld the constitutionality of the Tennessee "Hired Gun" statute, T.C.A. § 8-7-401, both as written and applied.[3]

On October 15, 1990, the Tennessee Supreme Court denied Steven

---

[3] *State v. Bennett*, C.C.A. Number 230 (Blount County) June 7, 1990; (copy attached at App. 32a).

Bennett's application for permission to appeal.

This petition follows as a question of first impression before this Court.

REASON FOR GRANTING THE WRIT

THE TENNESSEE "HIRED GUN" STATUTE WHICH PERMITS PRIVATE ATTORNEYS TO PARTICIPATE IN PUBLIC PROSECUTIONS VIOLATES BOTH THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE UNITED STATES CONSTITUTION.

I. Introduction -- The Origins of the Antiquated and Outdated Practice of Private Prosecution

A. The Medieval History of Private Prosecutions

The now unseemly practice of permitting private attorneys to help prosecute public offenses has its roots in

the ancient thickets of English common law.[4] In medieval times, the normal means of bringing criminals to justice in England was to allow the victim or the victim's family to institute criminal proceedings:

> The fact that the private vengeance of the person wronged by a crime was the principal source to which men trusted for the administration of criminal justice in early times is one of the most characteristic circumstances connected with English criminal law, and has had much to do with the development of what may perhaps be regarded as its principal distinctive peculiarity, namely, the degree to which a criminal trial resembles a private litigation.[5]

---

[4] *See e.g.*, Comment, *The Outmoded Concept of Private Prosecution*, 25 Am.U.L.Rev. 754 (1976)(hereinafter *Comment*); Berg, *Criminal Procedure: France, England, and the United States*, 8 DePaul L.Rev. 256,257 (1959)(hereinafter, "Berg").

[5] Id. at 756, n.12, *quoting*, 1 J.Stephen, *A History of the Criminal Law of England* 245 (1883).

These English origins influenced early common law in British North America.[6] As summarized in *State v. Ray*:[7]

> At common law, criminal prosecutions were generally carried on by individuals interested in the punishment of the accused, and not by the public. The private prosecutor employed his own counsel, had the indictment founded and the case laid before the grand jury, and took charge of the trial before the petit jury. . . .[8]

Although still a vestige of law in several states,[9] the completely private prosecution of public offenses has become an anachronistic practice in this

---

[6] *See generally*, Comment, at 765, n.73, and cases cited therein, all of which address this issue.

[7] 143 N.E.2d 484, 485 (Ohio App. 1956).

[8] Id.

[9] *See*, supra, note 6.

country,[10] and no longer exists in England, the land of its birth.[11]

During the past two hundred years, the United States has shifted from private to public prosecutions,[12] in a

---

[10] The dearth of recent cases on this issue itself warrants such an inference. Indeed, the statute challenged in this petition, Tenn. Code Ann. § 8-7-401, has been discussed in but a single Tennessee opinion prior to this case. *See*, *State v. Voltz*, 626 S.W.2d 291 (Tenn.Crim.App. 1981).

[11] In Great Britain, the Director of Public Prosecutions directs felony criminal prosecution and has the exclusive right to select counsel to represent the crown. *See*, *Comment* at 756.

[12] In the United States, several states have condemned the private practice. *See, e.g.*, *State v. Harrington*, 534 S.W.2d 44 (Mo. 1976)(held unconstitutional); *McKay v. State*, 90 Neb. 63, 132 N.W. 741 (1911)(held unconstitutional); *Biemel v. State*, 37 N.W. 244-248 (Wis. 1888)(held unconstitutional); *Meister v. People*, 31 Mich. 99 (1875)(held unconstitutional); *Commonwealth v. Williams*, 56 Mass. (2 Cush) 582 (1849)(limited to "peculiar circumstances" or "some stringent reason"); *Born v. State*, 397 P.2d 924 (Okla.Crim.App. 1964)("frowned upon" by Court); *State v. Jensen*, 178 Iowa 1098, 160 N.W. 832 (1917)(prohibited where attorney involved in civil and criminal matters

(continued...)

fundamental change which predates the American Revolution.[13]

The modern system of public prosecutions ensures that officials are selected for the purpose of impartially prosecuting criminal acts, which by their very nature affect the general public and not just a specific individual.

Thus, in striking down the use of privately retained counsel in a criminal trial, the Wisconsin Supreme Court said:

> In an early day in England private parties prosecuted

---

[12](...continued)
arising from some facts); *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951)(prohibited if involved in civil and criminal matters); *Cantrell v. Commonwealth*, 229 Va. 387, 329 S.E.2d 22 (1985)(private prosecutors hired by family of murder victim held to violate due process under Virginia constitution).

[13] *See, 4 National Commission on Law Observation and Enforcement, Report on Prosecution 7 (Wickersham Commission 1931) (discussing the establishment of the Office of Attorney General in Virginia during the latter part of the seventeenth century).*

> criminal wrongs which they suffered. They obtained an indictment from a grand jury, and it became the duty and the privilege of the person injured to provide a prosecutor . . . to prosecute the indicted person. Our scheme of government has changed all this. It is . . . the better public policy to provide for the public prosecution of public wrongs without any interference on the part of private parties, although they may have been injured in a private capacity different from the general public injury that accrues to society when a crime is committed.[14]

The Court elaborated:

> [U]nder our system we have private prosecution for private wrongs and public prosecution for public wrongs. Our scheme contemplated that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of the

---

[14] *State v. Peterson*, 281 N.W. 367, 369 (Wis. 1920)(striking down the role of the private prosecutor in criminal prosecutions).

complaining witness or that of the defendant.[15]

Hence, the ancient practice of allowing private attorneys to participate in public prosecutions is the antithesis of the modern system of public prosecution.

What may have been acceptable hundreds of years ago to bring individuals to justice has been rendered obsolete by a system of criminal justice which now seeks to eliminate private passions and animosities by providing evenhanded prosecutions by public officials.

B. Ethical Considerations

The development of public prosecutions in our criminal justice system has precipitated recognition of the unique standards and duties that public prosecutors must uphold. In the landmark

---

[15] Id. (emphasis added).

opinion of *Berger v. United States*,[16] this Court said:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape nor innocence suffer.[17]

This Court echoed Berger just three years ago when it noted the special duty of the public prosecutor as set forth in the Ethical Considerations and Standards published by the American Bar Association:

> This distinctive role of the prosecutor is expressed in Ethical Consideration (E.C) 7-13

---

[16] 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

[17] *295 U.S. at 88 (emphasis added).*

> of Canon Seven of the American Bar Association (A.B.A.) Model Code of Professional Responsibility (1982): "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."[18]

Conversely, the responsibility of the private attorney is vastly different. Ethical Consideration 7-1 of Canon Seven contemplates that the zeal of the advocate is to be directed solely to the best interests and desires of his/her client, within the bounds of the law.

The incompatibility between the ethical responsibilities of a public prosecutor and those of a private attorney is self-evident.

---

[18] *Young v. U.S. Ex Rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 107 S.Ct. 2124, 2135, 95 L.E.2d 740, 756 (1987) (emphasis added).

This Court has made it clear that the public prosecutor is cloaked with the unique and independent duty of his office which is to see that justice is done.

The private attorney, however, who is retained by a victim or the family of a victim and then cast in the role of prosecutor is inherently and fundamentally different. Once associated with the prosecutor's office, the attorney may ostensibly be bound by the same restrictions and duties; however, as a retained private lawyer, his zeal is to be directed to furthering the best interests of his client.

The term "private prosecutor" is thus, in reality, a contradiction in terms.

A private attorney has one obligation to his client, the public prosecutor has another to the public. The privately retained lawyer should never be

permitted to cloak his true private interests in the guise of the public prosecutor.

Each of the Courts which have rejected the practice of permitting privately retained attorneys to assist in public prosecutions have stressed this inevitable, untenable ethical conflict, as well as the unfairness that is brought to bear against a criminal defendant. In Nebraska, the Supreme Court has noted:

> [C]ounsel employed by outside parties, and, in the case of a homicide, by relatives of the deceased would not feel bound by [the public prosecutor's standards of conduct]. He appears as private counsel simply to represent the wishes, prejudices, and animosities of his clients; to secure a conviction at all hazards.[19]

---

[19] *McKay v. State*, 90 Neb. 63, 132 N.W. 741 (1911) (emphasis added).

Likewise, the Wisconsin Supreme Court has expressed similar concerns:

> The prosecuting officer represents the public interest which can never be promoted by conviction of the innocent. His object, like that of the Court, should be simply justice; . . . [c]riminal cases are not likely to be so presented if the prosecution is permitted to be conducted by the paid attorneys of parties who from passion, prejudice, or even an honest belief in the guilt of the accused, are desirous of procuring his conviction.[20]

And in reversing a murder conviction because of the practice of allowing private prosecutors employed by private clients to participate in the public prosecution of a defendant, the Missouri Supreme Court reasoned:

---

[20] *Biemel v. State*, 37 N.W. 244-248 (Wis. 1888) (emphasis added); *see also*, *State v. Scherr*, 101 N.W.2d 77 (Wis. 1960) (private prosecutors against public policy and impartial administration of criminal justice).

> The practice invites error from an excess of zeal which might well be avoided by leaving the conduct of criminal prosecution entirely in the hands of the elected official upon whom such duty has been placed.[21]

Hence, allowing attorneys to act as private prosecutors creates an inescapable ethical quandary in which the private attorneys must attempt to serve two masters, the interests of their client and the interests of the public.[22]

As at least three State courts have noted, such an attempt inevitably

---

[21] *State v. Harrington*, 534 S.W.2d 44, 48 (Mo. 1976) (emphasis added).

[22] *See e.g.* A.B.A. Code of Professional Responsibility EC 5-14: Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant.

results in animosities and prejudices. That such differing interests -- and the unfairness that can result -- are so easily avoidable by simply relying upon properly elected public prosecutors to perform their duties underscores the antiquated and unnecessary nature of private prosecutions.

Quite simply, private participation in the prosecution of public offenses no longer has a place in the American system of criminal justice.

II. Tenn. Code Ann. § 8-7-401 violates fundamental notions of due process of law as afforded by the 14th Amendment to the United States Constitution.

A. As Written

A fundamental requirement of due process is that a criminal defendant receive a fair trial before a fair tribunal.[23]

In discussing the right to a fair trial, this Court has said:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . [T]o perform its high function in the best way, 'justice must

---

[23] *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *In re Murchison*, 349 U.S. 133, 136 (1955).

satisfy the appearance of justice.'[24]

The evil of the Tennessee Hired Gun statute is that it tips the due process scales to such a probability of unfairness that the "appearance of justice" is not satisfied.

Tennessee Code Annotated Section 8-7-401 provides in its entirety:

> "T.C.A. 8-7-401. Employment of private counsel by crime victim - Participation as co-counsel in prosecution of crime. A victim of crime or the family members of a victim of crime may employ private legal counsel to act as co-counsel with the district attorney general or his deputies in trying cases, with the extent of participation of such privately employed counsel being at the discretion of the district attorney general. The district attorney general or his deputy shall make the final and concluding argument. The privately retained counsel shall immediately inform the district attorney general of his

---

[24] *In re Murchison*, 349 U.S. 133, 136 (1955), *quoting*, *Offut v. United States*, 348 U.S. 11, 14 (1954).

> employment. [Acts 1978, ch. 883 section 1; T.C.A. section 8-729.]" (emphasis added).

Thus the Tennessee statute by its express terms allows families of victims to retain private attorneys to act as "co-counsel" with the District Attorney in criminal prosecutions.

By the very use of the term "co-counsel", the Hired Gun Statute creates the inherent ethical conflict of interest noted by Courts in other states. In Tennessee the privately retained attorney must fulfill the duty of the public prosecutor while simultaneously serving only the interests of his client. The private lawyer serves as "co-counsel" to the District Attorney, thus implying he has the same ethical obligation to fulfill as does the District Attorney. Likewise, he appears in court as co-counsel to the District Attorney during trial.

Inevitably, however, the private "co-counsel" brings to the courtroom the passions, prejudices and/or animosities held by his client. If it were not so, the private lawyer would not be there in the first place. The private attorney is not in the courtroom to see justice done; he is there to obtain a conviction or a sentence on behalf of his client. No set of circumstances or pretenses can alter this undeniable fact or resolve this unresolvable conflict.

Moreover, on its face the statute permits both private and public counsel to appear before the jury in their respective capacities as lawyers for the victims of crime and lawyers for the people. No more chilling signal could be given to a jury that such a case is different and that the interests of the victim or his family

should be particularly taken into account in reaching a verdict.

Furthermore, the statute on its face contains so few restrictions on the role of the private co-counsel as to raise the appearance of impropriety. Once retained, the private lawyer simply gives notice to the District Attorney that he has entered the case. Thereafter, the private prosecutor may take the place of the public prosecutor in all aspects of trial except for the "final and concluding" argument.

While it is true the extent of participation of the private lawyer is ostensibly to be determined at the discretion of the District Attorney, the Supreme Court of Michigan saw through this pretense long ago and denounced it for the fiction it is:

> When counsel are introduced in a cause, and aid in the trial or argument, it is little short of absurd to suppose they can be

> prevented from having their own way. . . . We must look at things as how they exist; and everyone knows that if a prosecuting attorney allows the counsel of private parties to intervene, it must usually be for the reason that they will save him labor, and to assume the burden of prosecution.

Meister v. People, 31 Mich. 99, 105-106 (1875).

Thus, Tenn. Code Ann. § 8-7-401 provides a statutory mechanism which on its face creates a palpable conflict of interest, signals a jury that the desires of the victim or his family are particularly significant, and does so with little significant limitations on the role of the private lawyer.

The interjection of private attorneys and private resources into what is intended to be a public prosecution of a public wrong, warps the criminal process and infects the process with the

probability of unfairness that due process cannot tolerate.

Hence, the appearance of unfairness which accrues as a direct result of Tenn. Code Ann. § 8-7-401 is sufficient, under the decisions of this Court,[25] to warrant the protection of the 14th Amendment. Accordingly, the Tennessee Private Prosecution statute should be held unconstitutional on its face.

B. As Applied to the Instant Case

Assuming, arguendo, that Tenn. Code Ann. § 8-7-401 is not facially unconstitutional, the facts of the present case indicate that the participation of the private prosecutors was nonetheless unconstitutional.[26]

---

[25] *In re Murchison*, *supra*.

[26] The following federal cases involving private prosecutors in analogous settings have addressed due process concerns as applied: *Ganger v. Peyton*, 379 F.2d 709 (continued...)

Prejudice arose prior to trial, then continued throughout as an inevitable consequence. The affluent family of the deceased retained their private attorneys to prevail upon the State prosecutors to seek the death penalty. Indeed, it was only after these attorneys intervened and pressed their client's demands that the district attorney general filed notice that

---

[26](...continued)
(4th Cir. 1967)(participation of a private prosecutor who was also involved in a related civil matter invalidated a conviction for violation of fundamental fairness assured by due process clause); *Hughes v. Bowers*, 711 F.Supp. 1574 (N.D.Ga. 1989)(prosecution rendered fundamentally unfair by participation of special prosecutor retained by victim's family, where the attorney also represented the family in related insurance claim); *but see, Jones v. Richards*, 776 F.2d 1244 (4th Cir. 1985)(not a per se due process violation); *Slumbo v. Scabold*, 704 F.2d 910 (6th Cir. 1983)(no due process violation unless shown the attorney has ignored the interests of justice in securing a conviction); *State of N.J. v. Kinder*, 701 F.Supp. 486 (D.N.J. 1988)(no due process violation where private attorneys participate in prosecuting less serious crimes).

the prosecution would seek the death penalty on facts which were tragic but which clearly did not warrant such a momentous penalty under the facts adduced by the prosecution or the law of the State at the time.[27]

The decision to seek the death penalty on such meager evidence must be seen for what it was: a decision to permit

---

[27] The applicable Tennessee law on the "aggravating" circumstance cited by the State did not fit the facts of the instant case, because the Tennessee Supreme Court has consistently interpreted Tenn. Code Ann. 39-2-203(i)(3) as requiring that a defendant shoot at, wound, or otherwise threaten other witnesses. *See e.g., State v. Cone*, 665 S.W.2d 87, 95 (Tenn.1984)("[c]ontemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder."); *State v. Workman*, 667 S.W.2d 44 (Tenn. 1984) (defendant killed one officer, shot a second, and fired at a third); *State v. Johnson*, 632 S.W.2d 542 (Tenn. 1982)(three people shot inside a store and one killed, two more killed outside); *Cozzolini v. State*, 584 S.W.2d 765 (Tenn. 1979)(officer shot twice and killed, defendant exchanged shots with two others).

an affluent family using private prosecutors to dictate the ultimate objective of the State and to use the power of the public prosecutors as an instrument of private revenge.

That private parties could have such pervasive influence over what was intended to be a public prosecution is a reflection of the unfairness that later permeated the trial.

Acting within the ambit of the Tennessee statute, the aggrieved family of the deceased retained not one but two private lawyers to serve as co-counsel at the trial. Thus, throughout the trial, the prosecution team consisted of two private lawyers and a single assistant public prosecutor. In sheer terms of numbers, therefore, the private lawyers constituted two-thirds of the prosecution team in the courtroom, a fact which implicitly

continued to emphasize to the jury the predominate interests of the family of the deceased.

Indeed, both private lawyers participated actively in all phases of the ensuing trial.

During jury selection they both took special pains to emphasize to the jury their unique relationship to the mother of the deceased who was in the courtroom and who they introduced to the venire.

Both men also emphasized to the venire that the case was a death penalty case, although neither mentioned their own

role in the State's decision to seek the death penalty.[28]

One of the private lawyers delivered the opening statement on behalf of the prosecution while the other delivered part of the final argument at the end of the trial. Between the opening statements and final arguments both men called witnesses for the prosecution in its case in chief and cross-examined witnesses called by the defense.

In sum, the ostensible discretion of the District Attorney was used to permit the lawyers for the family of the deceased to participate in every phase of the trial.

---

[28] Similarly, neither lawyer directly referred to his position of political leadership in the community. They did repeatedly refer to the fact that their office was located across the street from the Courthouse, an oblique reference perhaps to the fact that the two defense counsel, who had no political affiliations, were from in a different county.

Subjecting the petitioner to the combined resources of both private counsel and public prosecutors before a jury that had been told it was to consider imposing the most extreme and irreversible of all penalties,[29] did not "satisfy the appearance of justice" nor was it just.[30]

Other courts have expressed due process concerns about the actual use of private prosecutors independent of any

---

[29] Indeed this Court has repeatedly stressed the extra safeguards and protection that must be afforded to a defendant that faces not only the loss of his liberty but also the very loss of his life. *See, e.g., Reid v. Convert*, 354 U.S. 1, 45 (1957) ("The taking of life is irrevocable, it is in capital cases that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.") *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every procedural safeguard is observed.")

[30] *In re Murchison*, *supra*.

showing of actual prejudice. The Nebraska Supreme Court has stated:

> [I]t must appear to the mind at once, that the appointment of a partisan special prosecutor was not in the interest of the fair and impartial trial guaranteed by the Constitution.[31]

Similarly, in reversing a murder conviction, the Supreme Court of Missouri said:

> We believe and hold that the practice of allowing private prosecutors employed by private persons to participate in the prosecution of criminal defendants is inherently and fundamentally unfair and that it should not be permitted on retrial of this case or any case tried after publication of this opinion. . . .[32]

---

[31] *Fledge v. State*, 93 Neb. 610, 142 N.W. 276 (1913).

[32] *State v. Harrington*, 534 S.W.2d 44, 48 (Mo. 1976) (emphasis added); *See also, State Ex. Rel O'brien v. Moreland*, 778 S.W. 2d 400, 406 (Mo. App. 1989)(citing *Harrington*).

This Court itself has raised similar concerns in an analogous case, *Young v. United States Ex Rel. Vuitton Et Fils S.A.*[33] That case involved the appointment of private counsel with a pecuniary interest in the outcome as private prosecutors in a contempt proceeding. The Court stated:

> Regardless of whether the appointment of private counsel in this case resulted in any prosecutorial impropriety (an issue on which we express no opinion), that appointment illustrates the potential for private interest to influence the discharge of public duty.[34]

The majority went on to conclude that appointing an interested prosecutor was an error so fundamental that it required reversal without regard to the particular circumstances. The Court stated

---

[33] 481 U.S. 787 (1987).

[34] Id. at 805 (emphasis in original).

that such an appearance of impropriety "diminished faith in the fairness of the criminal justice system in general."[35]

The analogy to the instant case is apparent.[36] The dominant presence of two private prosecutors throughout the trial of the case created the improper appearance that the interests of the family

---

[35] Id. at 811. For the same reason, the actual outcome in the present case is irrelevant. Whether the result was a death sentence or a conviction on a lesser offense, the process itself was flawed and seen to be flawed by the intrusive presence of private attorneys intent upon their client's goals. *See also, Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967)(conviction of lesser offense does not remove the harm done because "we do not know and cannot ascertain what would have happened if the prosecuting attorney had been free to exercise the fair discretion which he owes to all persons charged with crime in his court.")

[36] Indeed, while the majority opinion in *Young* relies in part upon the supervisory authority held by federal courts, the due process undertones of the result reached were expressly emphasized in Justice Blackmun's concurring opinion. Id. at 2141.

of the deceased in this particular case were preeminent and that the jury should take into account the feelings of that family in reaching its verdict.

While every family who suffers a tragic loss has an understandable and human interest in the outcome of the litigation which arises from it, it is wrong to permit this interest to appear to influence the outcome of that litigation. Regardless of whether any actual prosecutorial impropriety existed (an issue which is not raised in this petition) the emphasis on the interests of the family of the deceased inevitably warp the appearance of fairness in any trial when a private lawyer appears. Such an appearance is worsened when not one but two private counsel appear and continue to pursue their quarry from all vantage points of the terrain which the criminal trial process affords.

If the character of the deceased is not properly at issue in a murder trial, the implied desires of the deceased's family seem even more remote and prejudicial to the fairness of the outcome.[37]

Hence, even if Tenn. Code Ann. § 8-7-401 is not unconstitutional as written, Steven Bennett was nonetheless denied his due process right to a fair trial by virtue of the very appearance of two lawyers who were there to emphasize the special desires of the aggrieved family.

III. Tenn. Code Ann. § 8-7-401 As Applied to the Instant Case Violated Fundamental Notions of Equal Protection As Afforded by the 14th Amendment to the United States Constitution

Steven Bennett was a man of limited means with an eighth grade

---

[37] *See, South Carolina v. Gathers*, ____ U.S. _____, 109 S.Ct. 2207 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987).

education. A truck driver, he lived with his wife, Cindy, and their two young children in a modest trailer in Blount County, Tennessee.

The tragic chain of events that transpired on October 31, 1987, had devastating consequences on his life and his family. Nonetheless, he stood ready to come before the jury and explain his actions. He asked only that he receive the same treatment as any other citizen accused of a crime.

He didn't get it.

Instead, as a direct result of Tenn. Code Ann. § 8-7-401, Steven Bennett received a death penalty trial with the interjection of not one but <u>two</u> private prosecutors, who were present before the jury for the explicit purpose of representing the desires of the family of the deceased to see him put to death.

Singling Steven Bennett out of a class of similarly situated defendants as one who had to defend himself against the combined resources of both the State and an affluent private family, violated fundamental notions of equal protection of the laws as embodied in the 14th Amendment to the United States Constitution.

In an analogous case concerning the equal protection rights of indigent criminal defendants, this Court in *Griffin v. Illinois*,[38] aptly stated that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[39]

This case raises the specter of injustice in two respects.

---

[38] 351 U.S. 12 (1956).

[39] Id. at 19.

First, as a corollary to Griffin, there can be no equal justice where the kind of trial a man gets depends on the amount of money a private party has. The procedure permitted by Tenn. Code Ann. § 8-7-401 suggests that well-to-do citizens who can afford private prosecutors have greater rights of access and greater rights of argument in a public criminal trial in the State of Tennessee than do less well endowed citizens.[40]

Second, the accused, in a case where private prosecutors have been retained, will never have commensurate resources with which to resist the combined resources of both the state and the interested parties who have placed their private resources at the state's disposal.

---

[40] It goes without saying only well-to-do Tennesseans could afford the luxury of hiring their own "private" prosecutors.

Citizens like Steven Bennett are therefore unfairly and impermissibly singled out from similarly situated defendants for just such joint public/private prosecutions. While most who stand accused in Tennessee are prosecuted solely by the State, the unlucky few must run a gauntlet that is unfairly lengthened just where it grows most hazardous by private floggers intent upon a private retribution. Few men of modest means could emerge unscathed. Steve Bennett didn't. Thus, Tenn. Code Ann. § 8-7-401 creates discordant treatment of similarly situated citizens and the same type of evils feared in Griffin.

These inherent vices result in a denial of equal protection without offering any compensating virtues. Indeed there is simply no compelling or even rational

interest to be achieved in permitting such an antiquated practice.

The Tennessee Legislature has provided for a qualified staff of public prosecutors[41] who are clearly able to handle even the most complex cases with competence.

These public attorneys are paid from public funds to avoid the obvious hazards of conflicting interests and/or divided loyalties.[42]

Additionally, the Tennessee legislature has provided a system with which to replace or supplement a prosecution with additional publicly chosen

---

[41] Tenn. Code Ann. § 8-7-102 and 8-7-103.

[42] Tenn. Code. Ann. § 8-7-105.

and impartial attorneys should the need ever arise.[43]

In the instant case, experienced and competent public prosecutors had obtained a first degree murder indictment and were expeditiously proceeding to trial. There was no danger that any public wrong committed by Steven Bennett would go unaddressed by the State. Yet, a family of means desired to purchase its own brand of justice and to seek the punishment they deemed appropriate.

The outmoded and unnecessary nature of the Tennessee Hired Gun statute permitted them to do so. By singling out a single criminal defendant for disparate treatment without offering in return any justifiable state interest, Tenn. Code Ann. § 8-7-401 violated fundamental notions of

---

[43] Tenn. Code Ann. § 8-7-106 and 8-7-107.

equal protection of the laws as afforded by the 14th Amendment.

IV. Conclusion

The petitioner was convicted of murder in the second degree following a criminal trial in which a Tennessee statute permitted the passions, prejudices and concerns of private parties to pervade the courtroom and the trial which led to his conviction.

For all the reasons stated herein, Steven Bennett was denied his rights under the United States Constitution. He thus respectfully requests that this Court grant this petition for a writ of certiorari and in due course eliminate from modern American jurisprudence this unseemly and unfair relic from the English medieval past.

Respectfully submitted,

CHARLES W. B. FELS
Counsel of Record
RITCHIE, FELS & DILLARD, P.C.
606 W. Main Avenue
Post Office Box 1126
Knoxville, TN 37901-1126
(615) 637-0661
Attorney for Petitioner

IN THE CRIMINAL COURT FOR
BLOUNT COUNTY, TENNESSEE
DIVISION II

STATE OF TENNESSEE	)	
	:	
	)	
v.	:	NO. C-3732
	)	
	:	
STEVEN BENNETT	)	

MOTION TO CHALLENGE THE CONSTITUTIONALITY AND LAWFULNESS OF PERMITTING PRIVATE PARTIES TO RETAIN WELL-KNOWN PRIVATE COUNSEL TO PROSECUTE PUBLIC OFFENSES IN A HIGHLY PUBLICIZED CASE IN WHICH DULY ELECTED PUBLIC OFFICIALS ARE FULLY COMPETENT TO DISCHARGE THE DUTIES OF THEIR OFFICE

Steve Bennett moves this Honorable Court for an Order holding that the participation of private lawyers in the prosecution of this case is unconstitutional, illegal, and unwise.

STATEMENT OF FACTS

Steve Bennett, a truck driver with an eighth grade education, is to be prosecuted for murder by a team of at least two highly experienced public prosecutors and two well-known private prosecutors.

These prosecutors include the following:

(1) Attorney General David Ballard, a well-known, justly respected and experienced prosecutor who has served in his public position for approximately ten years;

(2) Steve Hawkins, Mr. Ballard's highly regarded Assistant District Attorney;

(3) Mr. Jerry Cunningham, the chairman of the Republican party for Blount County and a seasoned, extremely capable, attorney hired by the family of Lance Russell to help seek the death penalty;

(4) Kelly Thomas, Mr. Cunningham's active and able law partner, who is a leader in the Democratic party in Blount County and who serves on the state executive of the Democratic party for the state of Tennessee.

Private counsel have been retained to help seek the death penalty pursuant to Tennessee Code Annotated § 8-7-401 which purports to permit the family members of a victim of crime to employ private, legal counsel to act as co-counsel under the direction of the District Attorney General in the prosecution of public offenses.

The combination of two public and two private prosecutors seeking the death of an unlettered, father of two, living in modest circumstances, offends elementary notions of due process guaranteed by both the Fifth and Fourteenth Amendments to the Federal Constitution and Article 1, Section 8 of the Tennessee Constitution.

CONCLUSIONS OF LAW

The right of the accused in a criminal case to have a trial conducted in accordance with ordered notions of due

process is fundamental to both our state and federal constitution.

Any statute which transgresses the requirements of due process is unconstitutional.

Where as here, a statute purports to permit the public officials of this state to be reinforced by the best known private counsel in the jurisdiction, any citizen accused of crime faces a nearly insurmountable combination of both public and private resources dedicated to the termination of his liberty or, as in this case, his life.

Such a joint prosecution is inherently unfair and transgresses the due process clauses of both state and federal constitutions as well as the equal protection clause of the Fourteenth Amendment.

Statutes similar to T.C.A. § 8-7-401 have been roundly and justifiably criticized by other states on the grounds that they offend due process.

The Supreme Court of Missouri, sitting en banc, in 1976 reversed a murder conviction in part because the practice of allowing private prosecutors, employed by private persons, to participate in the prosecution of criminal defendants was inherently and fundamentally unfair. State v. Harrington, 534 S.W.2d 44 (Mo. 1976).

In a per curiam opinion, the Supreme Court observed:

> The practice invites error from an excess of zeal which might well be avoided by leaving the conduct of a criminal prosecution entirely in the hands of the elected official upon whom such duty has been placed.
>
> We believe, and hold, that the practice of allowing private prosecutors, employed by private persons, to participate in the prosecution of criminal defendants, is inherently and

> fundamentally unfair, and that it should not be permitted on retrial of this case or in any case tried after publication of this opinion in the Southwestern Reporter.

Id. at 48.

The Supreme Court of Wisconsin has likewise refused to permit the private assistance of private counsel in criminal cases pointing out:

> The prosecuting officer represents the public interests, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to the pride of professional success . . . criminal cases are not likely to be so presented if the prosecution is permitted to be conducted by the paid attorneys of parties who from passion, prejudice, or even an honest belief in the guilt of the accused, are desirous of procuring his conviction.

Biemel v. State, 37 N.W.2d 244, 245-48 (Wis. 1888) (emphasis added).

This widely reported case presents precisely those elements which the Wisconsin court criticized. Whether from passion, prejudice or an honest belief in the guilt of the accused, a family of means has retained distinguished private counsel to help secure the kind of conviction they deem appropriate on the facts as they believe them to be. Private counsel are understandably intent upon procuring the conviction and execution of the accused because that is the desire of their private clients.

The Wisconsin Supreme Court has pointed out the fallacy in permitting this kind of representation in a criminal case:

> In an early day in England private parties prosecuted criminal wrongs which they suffered. They obtained an indictment from a grand jury, and it became the duty and the privilege of the person injured to provide a prosecutor at his own expense to prosecute the indicted person. Our scheme of

> government has changed all this. It is now deemed the better public policy to provide for the public prosecution of public wrongs without any interference on the part of private parties, although they may have been injured in a private capacity different from the general public injury that accrues to society when a crime is committed. So under our system we have private prosecution for private wrongs and public prosecution for public wrongs. Our scheme contemplates that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of complaining witnesses or that of the defendant.

State v. Peterson, 218 N.W. 367, 369 (Wis. 1928)(striking down the role of the private prosecutor in criminal prosecutions in that case) (emphasis added).

In the present case the State belatedly seeks the death penalty on facts which do not appear to warrant such a punishment at least in part because the family of the deceased want Steve Bennett executed. This practice of mixing public

and private motives by means of public and privately retained counsel has been justly criticized on the grounds that the responsibility of a public prosecutor differs from that of the usual private advocate and that the appearance of a conflict of interest would bar such mixed responsibilities. Harrington at 50; see Code of Professional Responsibility, D.R. 7-101 (representing a client zealously); D.R. 7-103 (performing the duty of public prosecutor other government lawyer) and E.C. 9-2 ("when explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession").

The use of private prosecutors in a death penalty prosecution in the state of

Tennessee raises the specter of all these vices with no compensating virtues.

In the present case, the public prosecutors are well known and highly regarded as competent, vigilant, and impartial servants of the public good. They do not require nor have they solicited the intervention of private counsel acting on behalf of private parties with private interests.

The use of private prosecutors in these circumstances suggest that well-to-do citizens who can afford "private prosecutors" may have greater rights of access and greater rights of argument in the public criminal trial of a well publicized case in the state of Tennessee than do less well endowed citizens.

The corollary is that the accused in a case such as this may not have commensurate resources with which to resist

the combined resources of both the State and the interested private parties who place their resources at the State's disposal. Worst of all, citizens like Steven Bennett are unfairly and impermissibly singled out from other defendants in similar cases for such joint public/private prosecutions.

In each of these respects, therefore, the statute and its application denies Steve Bennett his right to due process and equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 8 of the Tennessee Constitution.

REQUEST FOR RELIEF

The accused, Steve Bennett, therefore prays this Honorable Court to:

(1) Allow the accused to present evidence on this motion.

(2) Recuse the two distinguished private counsel from the trial of this case on the grounds that the participation of these two particular counsel in the trial of this particular case in this particular county constitutes denial of due process and equal protection.

(3) Order the exclusion of all private counsel from the continued prosecution of this case on the grounds that T.C.A. § 8-7-401 violates fundamental notions of due process and equal protection embodied in both the State and Federal Constitution.

(4) Grant such other and further relief that is appropriate considering the circumstances.

(5) In the event the Court declines to grant the accused relief from his continued prosecution by private counsel, the accused respectfully petitions

the Court for the privilege of raising this issue before the Court of Criminal Appeals on an interlocutory appeal pursuant to Rule 9(b) of the Rules of Appellate Procedure on the grounds that review upon entry of final judgment will be ineffective and the need to prevent irreparable injury by the continued prosecution of this case by private prosecutors is great. In so moving Steve Bennett notes that no reported case appears to have challenged the constitutionality of the statute in question since its passage in 1978. See State v. Voltz, 626 S.W.2d 291 (Ct.Cr.App. 1981).

IN THE CIRCUIT COURT OF
BLOUNT COUNTY, TENNESSEE

DIVISION II

STATE OF TENNESSEE	)	
VS.	)	CASE. NO. C-3732
STEVE BENNETT	)	
	)	
STATE OF TENNESSEE	)	
VS.	)	CASE NO. C-3733
DAVID ADAMS	)	

These Motions Regarding Private Prosecutors came on to be held on the 29th day of April, 1988, before the Honorable John Crawford, Judge, holding the Circuit Court for Blount County, at Maryville, Tennessee, and the folloiwng proceedings were had, to-wit:

* * * * * *

A I believe Mr. Fels' question more accurately set that out.

Q Okay. You're -- have you been retained on behalf of the family?

A We've been requested to assist in the prosecution by the family and said we would.

Q All right. Is there an attorney client relationship between your firm and the family?

A I believe there is.

Q And as a part of that attorney client relationship have you been requested and is it a part of your job as you understand that attorney client relationship to seek and secure a conviction in these two cases?

A Our job is to help the Attorney General prosecute this case and at this point that is to get a conviction.

Q And that's what you've been asked to do?

A That's what we've been asked to do, is to help the Attorney General.

Q Have you been asked to seek a conviction?

A Yes, assuming the case goes to trial.

MR. BLACK: All right. That's all.

MR. HAWKINS: I have no questions.

THE COURT: You may step down, Mr. Thomas. Call you next witness.

MR. FELS: That would conclude our proof in this regard, Your Honor.

THE COURT: Very well. You may present further argument.

MR. FELS: Thank you, Your Honor. Your Honor, the thrust of this argument is not so much the Constitutionality of the statute itself, although we have grave questions about that. It is not so much the question as to when by terms of the statute an individual becomes a victim of

crime and can retain private counsel, although we have concerns about that, but the thrust of this motion is rooted in due process and equal protection and has to do so with fundamental fairness in a death penalty case. In sum, Your Honor, four highly seasoned prosecuting counsel seek the death of a truck driver with an eighth grade education. I would not for a moment afford any man the opportunity to represent my client. And if Your Honor says that this is to be four against one, I shall do my steadfast best to represent the interest of Steve Bennett. But in many respects, Your Honor, given the wealth and talent I see across from this Courtroom, I'm reminded of shooting fish in a barrel, except that in this case there's only one fish, it's a small barrell, [sic] and there are four people that are taking aim at it. Fundamentally, Your Honor, it's not fair,

it's not right for some individual Defendants in our system to be singled out for this extra special attention. If it were right this law would permit families of substance or means, I'm not saying that's the case in this case, but it would permit families of substance or means who feel outrage, understandably, to retain the most famous, the most competent private counsel in their jurisdiction to assist already highly experienced, well respected, public prosecutors. And the difficulty with that is that private motives for the prosecution can become inextricably intertwined with public motivation for a public prosecution. Whether that happened or not in this case is not for us to say. I have the highest respect for the four individuals who are across the Courtroom from me. And I am confident that if anyone would try to avoid that intermixture it is

Mr. Ballard, Mr. Hawkins, Mr. Cunningham, and Mr. Thomas. But inevitably when lawyers are retained to seek the death penalty or to seek conviction, their interest on behalf of their private clients are inevitably different than the interest of the public official that is elected to apply the laws fairly and impartially, and certain states have so found. Wisconsin has struck down a similar provision. Missouri has struck down a similar provision. In murder cases, Your Honor, in which the verdict came back guilty the Supreme Courts in those states reversed on the gounds [sic] that this kind of combination is really just unfair. The words of those Courts have already been cited to Your Honor and I need not dwell upon them. But it is essentially that to the effect that public wrongs should be prosecuted by public officials, private

wrongs by private parties. In this particular case if we proceed in this fashion we'll be voir direing the jury that may well be known to the chairman of the Republican Party, to a leading member of the Democratic Party, in a county with a relatively small population, with a -- as we understand it, total electoral roll of some thirty-nine thousand people, many of whom who participate in public electoins [sic] and might well be known to these fine attorneys. We think this is a dangerous practice. It's loading the odds. It's not fair to do it and it's unnecessary to do it. And rather than have the Supreme Court or any Court have to review this down the line, the appropriate thing is to head it off here and now. And we respectfully request the Court to do so on behalf of these individuals who face trial at the hands of the State.

THE COURT: Mr. Black.

MR. BLACK: Nothing further, Your Honor.

THE COURT: General, what do you say for the State?

MR. HAWKINS: If the Court please, we can certainly take time to talk about Mr. Fels and Mr. Black. The Court, I known, is well aware of the ability of Mr. Black. He is a fine trial attorney and one of the best in this part of the State or this part of the Country. The Court is well aware -- Mr. Black being in this county and having represented many, many criminal Defendants. And Mr. Fels -- I appreciate the comments Mr. Fels had about us, but Mr. Fels does not have to take a back seat to anyone. Mr. Fels for many, many years, as the Court may be aware, was the Assistant U.S. Attorney. He handled all types of criminal prosecutions. He is

the one who is most closely associated with prosecuting in this part of Tennessee many sheriffs, many high officials of government who were involved in corruption and the dealing of drugs, and one of the finest and best prosecutors that I've ever had the pleasure of knowing. And he also is one of the best and efficient defense attorneys it's been my pleasure to know. Mr. Fels should not and will not, and of course during these proceedings and during the trial, take a back seat to anyone. And I noticed these two fine attorneys here, and they also earlier today had their private investigator with them. This isn't going to be a contest of four lawyers against one, or four lawyers against two, or as Mr. Fels puts it, a shooting fish in a barrel. This will be a case where I am sure on behalf of the Defendants all the material facts on their side will come out, all of

the witnesses that could have been called will be called, all of the experts will analyze the evidence that in their opinion should analyze the evidence. Let me go further with regard to this, as the evidence before the Court is that Mr. Cunningham and Mr. Thomas have been asked to assist in the prosecution and they have done so by the statute that the Tennessee Legislature has passed. They serve at the discretion of the District Attorney. And as by the tactics; the matters of investigation, the matters of Rule 16 Discovery, and all the rules that pertain to handling this Defendant in a fair and non-prejudicial manner, and keeping with the Constitution of Tennessee, rest on the shoulders of the District Attorney General's Office. That's the way it has been up to the point and that's the way it has been through the -- and that's the way

it will be through the trial. Mr. Cunningham -- we're glad to have Mr. Cunningham and Mr. Thomas assisting us as means of that statute. We believe the statute is Constitutional. As this Court well knows even before this statute was passed, at least in this jurisdiction, private prosecutors have been allowed for years and years. The Court may be more aware of that than I. But for years and years even before we had this particular statute, private prosecutors were allowed to help and assist the District Attorney General's Office. We believe the statute is Constitutional. That the rights of this Defendant will be protected by the Court, by his lawyers and in keeping with the prosecutorial standards of the District Attorney General's Office and by those standards which have been announced

previously. We ask the Court to overrule the motion.

THE COURT: Now, let me be sure -- Mr. Fels, you have covered all three motions in your opening argument?

MR. FELS: Yes, Thank you, Your Honor.

THE COURT: Do you have any closing argument to make in the matter?

MR. FELS: Nothing further. Thank you, Your Honor.

THE COURT: Prior to the 1978 statute it was certainly a custom in this part of Tennessee for private citizens to employ a private attorney to prosecute criminal matters. And sometimes the District Attorney or one of his Assistants in fact participated in that prosecution in the Courtroom and sometimes they did not, depending on the office and the jurisdiction of the particular case. Of

course history does not overcome a Constitutional defect, if there be one. In 1978 the Legislature enacted the following: "A victim of a crime or the family members of a victim of crime may employ private counsel to act as co-counsel with the District Attorney General or his deputies in trying cases with the extent of participation of such privately employed counsel being at the discretion of the District Attorney General. The District Attorney General or his deputy shall make the final and concluding argument. The privately retained counsel shall immediately inform the District Attorney General of his employment." Now, a number of argument have been made as to the unconstitutionality or impropriety of having private counsel in this case, one of them the Court notes with interest is that a jury may perceive a greater number and

possibly an enlarged quality in the prosecution. That may or may not be so. The Court does not believe that that is a matter that rises to a Constitutional level. It has been perceived by attorneys in both criminal and civil matters that sometimes it is to the detriment of a party to have too much counsel in appearance and sitting on one side of the Courtroom because it will have the exact opposite effect of giving the other side the appearance of the underdog, and therefore have the sympathy of the jury that is trying the case. I can remember that being discussed in a number of cases, and although a lawyer might like to take his usual place on one side of the Courtroom, he was instructed not to, so that there would not be -- appear to be too much manpower on one side of the Courtroom. But it appears at this point that General

Ballard and General Hawkins and Mr. Cunningham and Mr. Thomas will be here in this case. The Court does not find that the three motions have merit and overrules them at this time. The Court also observes that Mr. Fels is probably correct that it will be more difficult to select a jury because there will be many more people who know Mr. Thomas and Mr. Cunningham in one way or another, and will increase the probability that there may be challenges for cause with a larger number of the prospective veniremen, but the Court doesn't believe that it can overrule the Legislature on the basis of that increased difficulty for the Court in getting the matter quickly to trial. Now, gentlemen, I believe this brings us to the Motion for Change of Venue. And in that regard, Mr. Black, are you also asking for a change of venue?

MR. BLACK: Yes, Your Honor.

THE COURT: Very well. Let me ask you -- you do intend to offer evidence in this Motion.?

MR. FELS: Yes, Your Honor. I have two brief witnesses and I have an affidavit to submit to the Court.

THE COURT: I was going to ask by what means -- you have two witnesses?

MR. FELS: Two witnesses and an affidavit. Thank you, your Honor.

THE COURT: Very well. If you will call your first witness.

MR. FELS: Thank you. Mr. A. J. Bennett.

IN THE CIRCUIT COURT
OF BLOUNT COUNTY, TENNESSEE

DIVISION II

STATE OF TENNESSEE	)	
	)	
vs.	)	NO. C-3732
	)	
STEVEN BENNETT	)	

ORDER

It appearing that the order entered in this case on 9 May 1988 regarding a Rule 9 Interlocutory Appeal contains a clerical error of great significance; it is hereby ordered that the second paragraph of the order be stricken and the following substituted in its place:

"Upon consideration of the merits of this matter, the Court finds that an Interlocutory Appeal should not be permitted regarding these matters. The

Clerk shall furnish a copy of this order to all counsel."

The Clerk shall upon receipt of this executed order immediately advise all counsel of it by telephone or other equally expeditious means.

This the 18th day of May, 1988.

E
N
T
E
R

/s/
JUDGE

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1989 SESSION

STATE OF TENNESSEE,	)	
	)	C.C.A. No. 230
Appellee,	)	
	)	BLOUNT COUNTY
vs.	)	
	)	John Crawford, Judge
STEVEN BENNETT,	)	
	)	(Murder 2nd Degree)
Appellant.	)	

FOR THE APPELLEE:

Charles W. Burson
Attorney General &
Reporter
450 James Robertson
Parkway
Nashville, TN 37219

C. Anthony Daughtrey
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37219-5025

David G. Ballard
District Attorney General
Blount County Courthouse
Marvyille, TN 37801

FOR THE APPELLANT:

Charles W. B. Fels
Ritchie, Fels &
Dillard, P.C.
P. O. Box 1126
Knoxville, TN 37901

Steven R. Hawkins
Asst. Dist. Attorney General
Blount County Courthouse
Maryville, TN 37801

OPINION FILED: JUN 7 1990

AFFIRMED

Joe B. Jones, Judge

O P I N I O N

The appellant, Steve Bennett, was convicted of murder in the second degree by a jury of his peers. The trial judge, finding the appellant to be a standard offender, imposed Range I sentence of twelve (12) years in the Department of Correction. Since the appellant used a firearm in the commission of the offense, the trial judge imposed an additional sentence of five (5) years. These sentences are to be served consecutively. The effective sentence imposed by the trial

judge is seventeen (17) years in the Department of Correction.

The appellant appealed as of right to this Court following the denial of his motion for a new trial. Tenn. R. App. P. 3(b).

* * * * * * *

CONSTITUTIONALITY OF STATUTE PERMITTING THE USE OF PRIVATE PROSECUTORS IN CRIMINAL PROCEEDINGS

The victim's family employed two attorneys to serve as private prosecutors. One of the attorneys was active in the Blount County Democratic Party. The other attorney was active in the Blount County Republican Party. Both had served as county chairman for their respective parties. The attorneys actively participated in all phases of the prosecution against the appellant.

The appellant vigorously opposed the right of the private prosecutors to

participate in the trial on the merits. He filed a pretrial motion challenging their right to participate in the prosecution on constitutional grounds. The trial judge denied the motion. He subsequently appealed by permission to this Court pursuant to Rule 9, Tenn. R. App. P. The appellant's application was denied. Thereafter, the appellant sought permission to appeal the issue to the Tennessee Supreme Court pursuant to Rule 10, Tenn. R. App. P. The Supreme Court denied the appellant's application on the ground that the issue had become moot.

In this Court the appellant contends that the statute permitting the utilization of private prosecutors violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and the Law of the Land Clause contained in Article I,

Section 8 of the Tennessee Constitution. He further contends that the statute is unconstitutional in the manner in which it was applied in this case.

Prior to 1978, the common law of this State recognized the right of a victim, or the family of a deceased victim, to employ private counsel to assist the district attorney general, or his assistant, in the prosecution of the person who committed the offense against the victim. In 1978 the Tennessee General Assembly enacted a statute which recognizes the right of a victim to employ private counsel to assist in the prosecution of the accused. This statute[1] provides:

> A victim of crime or the family members of a victim of crime may employ private legal counsel to act as co-counsel with the district attorney general or his deputies in trying cases, with the extent of participation of

---

[1] Tenn. Code Ann. § 8-7-401.

> such privately employed counsel being at the discretion of the district attorney general. The district attorney general or his deputys shall make the final and concluding argument.

Contrary to the appellant's contention, the practice of permitting a privately retained prosecutor to assist a district attorney general, or his assistant, does not violate the Fourteenth Amendment to the United States Constitution or the Law of the Land provision contained in Article I, Section 8 of the Tennessee Constitution.[2] Consequently, Tenn. Code Ann. § 8-7-401 is constitutional.

Our review of the record does not reveal that the application of this statute in the case sub judice resulted in a

---

[2] Jones v. Richards, 776 F.2d 1244, 1247 (4th Cir. 1985); Powers v. Hauck, 399 F.2d 322, 325 (5th Cir. 1968); Stumbo v. Seabold, 704 F.2d 910, 911 (6th Cir. 1983); Commonwealth v. Hubbard, 777 S.W.2d 882, 883 (Ky. 1989).

depravation of a constitutional right. The private prosecutors did not engage in prosecutorial misconduct.[3] Nor does the record reflect that the private prosecutors represented the family of the victim in a civil case arising out of the occurrence which gave rise to the criminal prosecution.[4] Also, this was not a contempt proceeding which arose out of a civil prosecution.[5]

The district attorney general maintained control over the prosecution as required by out statute.

---

[3] See Stumbo v. Seabold, supra; Thomas v. State, 59 So.2d 517 (1952) (private prosecutor was over-zealous in the prosection of the accused).

[4] See Cantrell v. Commonwealth, 329 S.E.2d 22 (Va. 1985); Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967). See Jones v. Richards, supra.

[5] See Kearns v. Wolverton, 381 S.E.2d 258 (W.Va. 1989); State ex rel. Coppers v. Intern. Union, 298 S.E.2d 827 (W.Va 1982).

The appellant's complaint that a private prosecutor was permitted to argue during summation to the jury is likewise without merit. The statute does not prohibit a private prosecutor from making the opening argument to the jury. Only the rebuttal, or last argument, must be made by the district attorney general or his assistant.

This issue is without merit.

* * * * * *

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

STEVEN BENNETT,	)	
	)	
Appellant	)	
	)	
	)	
VS.	)	BLOUNT COUNTY
	)	C.C.A. NO. 230
	)	
STATE OF TENNESSEE,	)	
	)	
Appellee.	)	

ORDER

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion the application should be denied.

PER CURIAM

Reid, C. J. (not participating)

Tennessee Code Annotated Section 8-7-401 provides in its entirety:

> "T.C.A. 8-7-401. Employment of private counsel by crime victim - Participation as co-counsel in prosecution of crime. A victim of crime or the family members of a victim of crime may employ private legal counsel to act as co-counsel with the district attorney general or his deputies in trying cases, with the extent of participation of such privately employed counsel being at the discretion of the district attorney general. The district attorney general or his deputy shall make the final and concluding argument. The privately retained counsel shall immediately inform the district attorney general of his employment. [Acts 1978, ch. 883 section 1; T.C.A. section 8-729.]" (emphasis added)

AMENDMENT XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.